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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957.

No. 812.

J. M. BROWN, JR., H. M. BAUM, A. R. THOMAS, J. B. OTTS, JR., WILLIAM F. PENNINGTON, OLIVER C. BREEDLOVE, HOWARD EUGENE ANDERSON, BRUCE BARNETT, M. L. HALL, J. M. WELDON, H. K. PARKER, W. L. GRISSOM, C. L. McCUTCHEON and R. H. LETCHMAN, - - - - - - - - - - Petitioners,

versus

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, - - - - - - - - - - Respondent.

BRIEF OF RESPONDENT IN OPPOSITION.

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v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, - - - - - - - *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

There was no opinion of the District Court. The opinion of the Court of Appeals is reported in 252 F. 2d 149.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED.

Question 1.

Does Section 6 of the Norris-LaGuardia Act (47 Stat. 71, 29 U. S. C., Sec. 106) apply to a suit for damages where the defendants, members of two separate labor unions, are sued as individuals in a common-law conspiracy action, not as members of a union, for causing an illegal strike and where no union is sued and none took any part in the strike?

Question 2.

Where a minor grievance is being handled between a union and a railroad in the manner provided for by the Railway Labor Act (44 Stat. 577, *et seq.*, as amended, 45 U. S. C., Sec. 151, *et seq.*) but has not yet reached the stage at which it may be referred to the National Railroad Adjustment Board by either of the parties, may employees strike to coerce the railroad to accede to their position?

Question 3.

Does a United States District Court have jurisdiction of a carrier's suit for damages which results from a strike over a minor grievance caused by individual employees in violation of the Railway Labor Act and the governing collective bargaining agreement, against the contention that such a suit is within the exclusive jurisdiction of the National Railroad Adjustment Board?

STATUTES INVOLVED.

Section 6 of the Norris-LaGuardia Act and some of the pertinent sections of the Railway Labor Act are set forth in the Petition (pp. 3, 4).

Additional pertinent sections of the Railway Labor Act read as follows:

"§152. *General duties.*

First. DUTY OF CARRIERS AND EMPLOYEES TO SETTLE DISPUTES.

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. CONSIDERATION OF DISPUTES BY REPRESENTATIVES.

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute." 44 Stat. 577, as amended, 45 U. S. C., Sec. 152.

STATEMENT OF THE CASE.

Respondent, Louisville and Nashville Railroad Company, herein sometimes called the Railroad or plaintiff, sued in the District Court for damages resulting from an illegal strike instigated by the defendants at its Boyles Yard in Birmingham, Alabama. No union was sued. The case went to the jury against fourteen[1] defendants, petitioners here,[1] thirteen of whom were members of the Brotherhood of Locomotive Firemen and Enginemen, herein sometimes called the Firemen's Brotherhood, and one of whom was a member of the Brotherhood of Railroad Trainmen.[2] The purpose of the strike, according to the plaintiff's theory, was to compel the Railroad to yield to the position of the defendants in the handling of a "minor grievance", then in the process of adjustment between the Railroad and the Firemen's Brotherhood. The evidence showed without conflict not only that the union did not sponsor the strike but that it positively forbade it (R. 279).

This case, then, involves a "wildcat" strike on the part of certain railroad employees which prevented the mandatory procedures provided for by the Railway Labor Act from being effectively followed.

On October 19, 1955, the Railroad had published a bulletin announcing that it was abolishing the "outside

[1]The terms "defendants" and "petitioners" will be used interchangeably herein.

[2]The action was dismissed as to two of the alleged conspirators during trial. One of these two was a member of a third union, the

hostler helper" positions at its Boyles Yard in Birmingham (Def. Ex. 1; R. 883, 1471). This change affected three employees, one on each shift. Copies of the bulletin were furnished to the affected employees and to the Local Chairman of the Firemen's Brotherhood (R. 1331). Hostler helpers' duties are similar to those of firemen and such employees are, therefore, represented by the Firemen's Brotherhood (R. 883).

The Firemen's Brotherhood, acting on behalf of the affected employees, immediately protested the change, and the processing of the dispute as a minor grievance under the Railway Labor Act was in progress by October 20, 1955 (Def. Ex. 6; R. 1334, 1473, 1474).

All of this was announced to the membership of the Firemen's Brotherhood at its regular meeting on the night of October 21, 1955 (R. 1335). The defendants, however, not satisfied with having the matter handled as a minor grievance as required by the Act, joined together to bring about an unauthorized strike, over the protests of union officials, to compel the Railroad to restore the jobs. Between the Friday night union meeting and the afternoon of Sunday, October 23, 1955, there was considerable talk about the abolition of the jobs and several of the defendants prepared for a strike by acquiring picket signs (R. 521, 523).

On the afternoon of Sunday, October 23, 1955, a meeting of some twenty persons was held at the home of defendant Parker. Twelve of the fourteen petitioners attended this meeting (R. 177-180, 1192). The purpose of the meeting was to discuss ways and means

of getting the hostler helper jobs restored for the benefit of the three affected employees (R. 831). Again it was made known that the matter was being handled between the Railroad and the Firemen's Brotherhood in the usual manner (R. 899). Those present were familiar with the procedure (R. 905, 906). The advisability and the legality of a strike were discussed. One of the men present, T. A. Kennedy, himself a local union official, announced that he had talked by telephone with the General Chairman of the Firemen's Brotherhood in Louisville, Kentucky, immediately prior to the meeting and that he had been instructed to tell those present *not* to strike, that the union would not authorize or support any such activity (R. 219). Kennedy's remonstrances were not effective and he was asked to leave. He and at least two other firemen left the meeting prior to its conclusion (R. 220, 221).

Immediately after the meeting all those present who were due to report for work on the next shift telephoned the Engine Dispatcher and "laid off" from work (R. 297, 299).

At about 9:00 P.M. Sunday night most of those present at the meeting appeared at a cafe immediately across the street from the gate to the Boyles Yard, and at about the same time certain employees, including some of the petitioners, went through the yard announcing that a strike was in process and that the yard would be cleared of all personnel (R. 419, 423, 311-313). Threatening language was used toward those showing any unwillingness to leave their jobs. Within a few

minutes the yard was empty of personnel and work was at a standstill (R. 424, 439, 455).

At about the same time one of the petitioners went to the passenger station in downtown Birmingham (several miles from the Boyles Yard) where he threatened the life of a colored fireman with an open knife and ordered him to "shut down" his engine and leave his job. The threatened fireman left (R. 571, 572).

On the next day other petitioners visited the Railroad's premises at Decatur, Alabama, and by the use of threats caused employees there to leave their jobs (R. 558-562, 595, 598, 606, 613).

On the following day the railroad yard in Montgomery was shut down by similar activities (R. 662, 666, 672, 673).

Throughout the strike the gates leading into the Boyles Yard were patrolled by pickets.

As a result of these activities the Railroad was completely paralyzed throughout some 200 miles of its main line and remained so until the night of October 26, 1955, when the gates were cleared and the employees were allowed to return to work.

The evidence included the testimony of more than 60 witnesses and numerous exhibits, all consuming in excess of 1,200 pages in the printed record. As might be expected, the evidence was in conflict in certain respects. We have in the foregoing summary undertaken to present enough of the factual background out of which this suit arose to enable the Court to recognize

the significance of certain rulings made by the District Court and dealt with by the Court of Appeals.

Respondent submits the foregoing to be a fair summary, sufficient for the purpose of these proceedings.

The Railroad sued the defendants in three counts (R. 1-5). These are set out in full in a footnote to the opinion of the Court of Appeals (App. A, Petition).

Count One was based on a violation of a duty imposed upon the defendants as "employees" of a railroad company under the Railway Labor Act.

Count Two charged the defendants with wrongfully causing or procuring a breach of the collective bargaining agreement between the Railroad and the Firemen's Brotherhood.

Count Three was a common-law conspiracy count charging a wrongful and malicious interference with plaintiff's business through the means of an illegal strike.

The District Court dismissed Counts One and Two on motion of the defendants on the sole ground that they involved matters within the exclusive jurisdiction of the National Railroad Adjustment Board and that the District Court, therefore, had no jurisdiction over them (R. 24-27, 105, 106).

Count Three was not dismissed with Counts One and Two but was later dismissed on the ground that it was "defective" as a matter of pleading (R. 50).[1] After the dismissal of Count Three, plaintiff amended

[1] From petitioners' statement it would appear that Count Three was dismissed on jurisdictional grounds along with Counts One and Two. This is not the case.

its Complaint by the addition of Amended Count Three (R. 51-53) which was similar to Count Three in all material respects except that it contained the additional allegation that in causing the wrongful strike the defendants employed the means of violence and of intimidating and threatening plaintiff's other employees. Count Three as originally drafted had merely charged the defendants with wrongfully causing the strike. The means were not alleged.

The case was tried in the District Court on Amended Count Three. The trial consumed some six days.

At the conclusion of the evidence the court, in instructing the jury, read to it Section 6 of the Norris-LaGuardia Act (47 Stat. 71, 29 U. S. C., Sec. 106), and declared it applicable to this case (R. 1449, 1450, 1454, 1455, 1462). This section is set out in the Petition (p. 3). In addition, some 29 written charges relating to Section 6 and its special rule of agency were given to the jury at the request of the defendants. These were defendants' charges 23, 25, 26, 46, 47-53, inclusive; 55, 57-59, inclusive; 60, 61-70, inclusive; 74 and 75 (R. 1485-1503).

At the conclusion of the evidence and the instructions mentioned, the jury returned verdicts for the defendants.

The Court of Appeals for the Fifth Circuit reversed and remanded (App. A, Petition, p. 38). As noted in its opinion, it concluded that the District Court erred in three respects:

First, in holding that it did not have jurisdiction to try the matters presented under Counts One and Two of the original Complaint on the ground that exclusive jurisdiction of such matters was in the National Railroad Adjustment Board.[1]

Second, in dismissing Count Three of the original Complaint on the ground it did not state a claim upon which relief could be granted.

Third, in instructing the jury that Section 6 of the Norris-LaGuardia Act applied to a case in which persons are sued as individuals, not as members of a union, and no union is involved.

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[1]The Court of Appeals did not direct a trial on Count Two as stated in the Petition but remanded for further proceedings, expressly directing the District Court to determine if Count Two stated a claim under Alabama law and holding Count One did not state a claim upon which relief could be granted.

ARGUMENT.

Throughout these proceedings, in the courts below and in this Court, petitioners have persisted in treating the grievance relating to the abolition of the hostler helper jobs, on the one hand, and the unlawful strike, on the other, as a single "labor dispute". This confusion of these two totally separate controversies permeates their treatment of each of the questions argued. The distinction between them, though clear, should be emphasized because of the dogged frequency with which the two have been confused.

The hostler helper dispute was a minor grievance and was a matter in which the Railroad and the Firemen's Brotherhood were both properly interested. It was subject to ultimate referral to the Adjustment Board *if* adjustment between the parties failed. In that event, the merits of the hostler helper dispute would have been determined solely by the Board.

The strike, on the other hand, was a matter between the Railroad and its employees, particularly the instigators. The Firemen's Brotherhood was not a party to it. It grew out of the hostler helper dispute but was as separate from it as a black eye is from a boundary dispute between adjoining neighbors which leads to combat between them. The merits of a suit for assault and battery in such a case would not be dependent upon which of the combatants was right in the boundary dispute. So here the legal consequences of the wildcat strike are something apart from the required procedures when a minor grievance obtains.

The Railroad at no time has sought to have the District Court decide the hostler helper dispute or in any way deal with it on the merits. It has left that to the statutory and contractual grievance procedure. In the courts it has sought only damages resulting from the wrongful strike. These could not be obtained in any proceedings before the Adjustment Board.[1]

Respondent has felt it necessary to restate the questions presented in the Petition in order to present the propositions as fairly and simply as possible. In doing so, it takes up each of the points in the same order as in the Petition and with corresponding numbers.

Question 1.

SECTION 6 OF THE NORRIS-LA GUARDIA ACT HAS NO APPLICATION TO THIS CASE.

As a result of the District Court's dismissal of Count Three as originally drafted and its subsequent amendment pursuant to the District Court's admonition, plaintiff had the burden of proving not only that the defendants caused the strike of its employees but also that they accomplished this by intimidating other employees, threatening them with violence, etc. Since all of the defendant-conspirators did not

[1]That damages are recoverable at law for unlawful strikes and picketing, please compare *Russell* v. *International Union, etc.*, 64 So. 2d 384, affirmed 88 So. 2d 175, certiorari granted 352 U. S. 915; *Benz* v. *Compania Naviera Hidalgo*, 233 F. 2d 62 (C. A. 9, 1956), affirmed 353 U. S. 138; *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U. S. 656; *Cuneo Press* v. *Kokomo Paper Handlers' Union*, 235 F. 2d 108 (C. A. 7, 1956), cert. den. 352 U. S. 912; and *Garmon* v. *San Diego Bldg. Trades Council*, ——— P. 2d ———, 33 Labor Cases 71,213, after remand in *San Diego Bldg. Trades Council* v. *Garmon*, 353 U. S. 26.

personally threaten or intimidate other employees, the rule of agency by which they were to be held responsible for the acts of one another became of paramount importance.

The defendants were charged with a conspiracy to commit the tort of a wrongful interference with the carrier's business. One of the basic principles applicable to an action of this kind is that any act done by any co-conspirator in furtherance of the common design is the act of all. This is nothing more than a rule of agency. It is universally recognized and is the law of Alabama. *Carlton* v. *Henry,* 129 Ala. 479, 29 So. 924; *National Park Bank* v. *Louisville & N. R. Co.,* 199 Ala. 192, 74 So. 69; 15 *Corpus Juris Secundum, Conspiracy,* Sec. 1028.

Instead of applying this rule, however, the District Court, after reading Section 6 of the Norris-LaGuardia Act (47 Stat. 71, 29 U. S. C., Sec. 106) to the jury, instructed that the defendants were entitled to its protection and that in order to find each of the defendants liable it was necessary that the jury be reasonably satisfied from all of the evidence that such defendant either actually participated in causing other employees of the plaintiff by means of intimidation, threats or violence not to perform their duties with the plaintiff or authorized or ratified such threats on the part of some other person. There were repeated references to the application of Section 6 in the court's oral charge (R. 1449, 1450, 1454, 1455, 1462) and in some 29 written charges requested by the defendants which were read to the jury (R. 1485-1503).

The Court of Appeals in reversing the District Court held that Section 6 was not applicable, stating:

> "We hold that if 14 different employees, of whom 13 are members of a large brotherhood and the fourteenth is a member of another, neither of which is in any way involved in the strike, engage in an illegal strike by such joint action as would would make them liable under the common law of conspiracy, their responsibility for the acts of each other in furtherance of such conspiracy is determined without benefit of Section 6 of the Norris-LaGuardia Act" (App. A of Petition, p. 38).

It is respondent's contention that the holding of the Court of Appeals is correct; that Section 6 has no application to a case of this kind, *i. e.,* where no union is involved and liability is not based on union membership; that this section was, on the contrary, intended to apply either to a suit against an organization for the unauthorized acts of an agent or to a case where it is undertaken to hold a member of such an organization, including a labor union, responsible for the unlawful act of another member or agent *solely on the basis of membership* in the organization. The legislative history of this section and the decided cases support this view. *N. L. R. B.* v. *Ohio Calcium Co.,* 133 F. 2d 721 (C. C. A. 6, 1943); *United States* v. *Kemble,* 198 F. 2d 889 (C. A. 3, 1952).

Petitioners, on the other hand, take the position that Section 6 applies in any case where the persons involved are members of a labor organization or union regardless of whether they are charged with responsi-

bility on that account alone or whether there are other grounds of liability, independent of union membership, viz:

> "We submit, however, that the correct interpretation of that section [referring to Section 6] only requires participation or interest in a labor dispute by either the union *or* an officer *or* member of the union" (Argument, Petition, p. 12).

This view seems to proceed on the theory that a union card as such carries with it a sort of built-in immunity from the common-law rules of agency. Thus, petitioners would apparently contend that whenever two or more members of a union have a private or personal dispute with their employer, each is entitled to the protection of Section 6 even though the union is in no way involved and they act together as individuals. According to this view, Section 6, which was designed to protect against the formerly prevalent concept of guilt-by-membership-alone, has become an instrument of immunity-by-membership-alone.

It should be noted that petitioners purport to rely on the *Carpenters* case (*United Brotherhood of Carpenters* v. *United States*, 330 U. S. 395) and that they suggest a conflict between this Court's decision there and the decision of the Court of Appeals below.

It is respondent's position that the Court of Appeals' conception of the proper application of Section 6 is correct and in accord with Congressional intent; that there is in fact no conflict between the decision below and this Court's decision in the *Carpenters* case (or for

that matter the decisions of any of the other circuits); that, finally, as will be shown hereafter, the basic question of whether Section 6 may be properly applied to a case of this type is not adequately presented on this record.

Historically, Section 6 grew out of the situation engendered by the well-known *Danbury Hatters* case (*Lawlor* v. *Loewe*, 235 U. S. 522; and see the same case 208 U. S. 274) and others in accord (e. g., *United States* v. *Railway Department of A. F. of L.*, 283 Fed. 479, D. C. Ill., 1922), in which all of the members of labor unions were being held responsible for the acts of agents or other members of the union *solely because of their membership.* This history is discussed in the opinion in the *Carpenters* case (330 U. S. 404).

Accordingly, when the Norris-LaGuardia Act was being considered in Congress it was repeatedly explained as remedial of the situation described.[1]

Thus Congress was concerned with relieving from the oppressive situation of responsibility based on union membership alone, not responsibility based on active participation in concerted wrongful activities independent of union sponsorship such as is presented in this case.

The language of the section itself is clear and to this effect, *i. e.*, "no . . . member of any . . . organi-

[1] *E. g.*, Congressman McKeown of Oklahoma, speaking for the bill, justified the inclusion of Section 6 in the following manner:

> "You cannot make an association of men responsible for everything that any one member of the association has done in violation of law." (Congressional Record, 72nd Congress, 1st Sess., Vol. 75, Part 5, page 5487—Mar. 8, 1932.)

zation . . . participating in a labor dispute . . . shall be held responsible . . . for the unlawful act of individual . . . members or agents, except upon . . .," etc. (47 Stat. 71, 29 U. S. C., Sec. 106).

In this case the defendants were sued as individual wrongdoers who joined together to commit a common-law tort. No union was sued. The cohesive element binding them together was the conspiracy or combination, not union membership. They belonged to two different unions—neither of which was participating in or sponsoring the strike. In fact, the union to which a majority of them belonged was trying to prevent the strike. The defendants were sued as joint tort-feasors and were properly subject to the ordinary rules of agency, including that applicable to conspiracy actions, with respect to one another's acts. They were not entitled to the special protection of Section 6 of the Norris-LaGuardia Act.

The Court of Appeals for the Eighth Circuit has dealt with this question, and its decisions are in accord with the decision of the Fifth Circuit in this case. *Bianchi* v. *United States,* 219 F. 2d 182 (C. A. 8, 1955); *Callanan* v. *United States,* 223 F. 2d 171 (C. A. 8, 1955).

There is no conflict between the decision below and this Court's decision in the *Carpenters* case. It will be recalled that in that case criminal violations under the Sherman Act were charged against employers, employers' associations and labor unions, together with officials and agents of both. The trial court failed to instruct the jury on Section 6. This Court dealt with

this single question and held the District Court was in error, stating in its opinion as follows:

> "We hold that its [referring to Section 6] purpose and effect was to relieve organizations, whether of labor or capital, and *members of those organizations* from liability for damages or imputation of guilt for lawless acts done in labor disputes by some individual officers or members of the organization without clear proof that the organization or *member*, charged with the responsibility for the offense actually participated, gave prior authorization, or ratified such acts after actual knowledge of their perpetration." 330 U. S. 403. (Emphasis supplied.)

It is clear that in the *Carpenters* case the Court was concerned with the liability of *organizations*, including members of the organizations, for the acts of their agents. The case did not deal directly with the question here presented, *i. e.*, membership in an organization being the sole basis of immunity of an *individual*. The portion of the opinion quoted above indicates, however, that it is only guilt by membership that is remedied and that the section was not designed to give members of unions an over-all immunity from responsibility for the wrongful acts of their own agents (however the agency may be established) in no way related to their membership in a union. If the theory of the defendant-conspirators were valid, the consequence would be that those conspirators who were union members would not be responsible for the results of the conspiracy, whereas their co-conspirators who were not

union members would be liable. No such unequal result was intended by the law.

This is made even clearer in another portion of the opinion, viz:

> "Individuals without association authority, may be guilty of such a conspiracy as this under the Sherman Act, but under Section 6 they will not be guilty *merely because they are members or officers of a guilty association.*" 330 U. S. 410. (Emphasis supplied.)

There is, therefore, no conflict between the decision below and that of this Court in the *Carpenters* case. The rule of the *Carpenters* case is strict enough when confined to its proper sphere.[1] No reason appears for its extension. Certainly it is not authority for the proposition sponsored by petitioners in this case.

Finally, on the record presented, the question as we have discussed it is not really reached. As noted in the opinion below[2] the instructions actually given by the trial court were erroneous under *any* construction of Section 6 and regardless of the issues presented by the pleadings, in view of the evidence in this particular case. The jury was told not only that Section 6 *could*

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[1] See the dissent by Mr. Justice Frankfurter, concurred in by the Chief Justice and Mr. Justice Burton, 330 U. S. 413, *et seq.*

[2] "The effect of this last charge was to instruct the jury that the several defendants were members of an association or organization participating or interested in a labor dispute, and thus nullified the previous charge, and, contrary to all the evidence of the case instructed the jury, as a matter of law, that some union was participating or interested in the dispute. The testimony was undisputed that no brotherhood was in any way a participant in the work stoppage or interested in it in the sense that it had anything to do with it." (App. A, Petition, p. 37)

apply, depending upon whether the defendants were found to be members of a union participating, etc., in a labor dispute, but that it *did* apply, *i. e.*, in effect that all of the defendants *were* members of a participating organization. In view of the Firemen Brotherhood's disapproval of the strike and of the fact that one of the most active defendants, Pennington, was a member of another union which had no interest whatever in the strike or the hostler helper grievance, it is difficult to see how the jury could have found all the defendants were members of participating unions, etc. At the very least, however, it was a jury question. Yet the District Court in effect affirmatively charged on this point in favor of the defendants in complete disregard of the evidence. This error alone required reversal.

Thus, respondent submits for the reasons assigned that the decision of the Court of Appeals, insofar as it relates to Section 6 of the Norris-LaGuardia Act, affords no proper basis for certiorari.

Question 2.

A STRIKE OVER A MINOR GRIEVANCE, WHILE SUCH GRIEVANCE IS BEING HANDLED BETWEEN THE RAILROAD AND THE UNION IN ACCORDANCE WITH THE RAILWAY LABOR ACT, IS ILLEGAL.

Petitioners' statement that "the defendants, *together with 2,500 fellow railroad employees,* walked out in a labor dispute" is not accurate. The issue raised under the pleadings was that the defendants *caused* the strike and the evidence showed the other employees were "run out" and did not "walk out". We believe, however, that argument of this point can be pretermitted, inasmuch as it is the illegality of the strike, however caused, to which this question relates. We believe it unnecessary to argue the evidence in this court.

As we read this portion of their argument, petitioners' premises are:

1. There exists a vacuum in the Railway Labor Act, in that during the period of the handling of a dispute between union and railroad officials required by the Act as preliminary to reference to the National Railroad Adjustment Board, a strike over a minor grievance is entirely legal.

2. The Railway Labor Act does not deprive employees of the right to strike over a minor grievance although such a strike may be enjoined.

The first premise is unsupportable in the light of the authorities, and is negatived, both by the legislative purpose clearly expressed in the Railway Labor Act, and by the mandate of that Act for the handling of grievances between carriers and their employees.

The major objective of the Railway Labor Act is the avoidance of industrial strife *by conference between authorized representatives of the employer and the employee, Virginian Railway Company* v. *System Federation No. 40,* 300 U. S. 515, and see *Hanson* v. *Union Pacific Railroad Company,* 160 Neb. 669, 71 N. W. 2d 526, reversed on other grounds, 351 U. S. 225.

Ancillary to this objective, and to implement its accomplishment, the Congress established the National Railroad Adjustment Board to which exclusive jurisdiction was given to decide disputes over what have come to be called "minor grievances" after handling through the preliminary stages required by the Act. Either party was given the right to invoke the jurisdiction of the Board, *but only after a failure to agree,* viz:

> "Section 153(i). The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, *failing to reach an adjustment in this manner,* the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes" (44 Stat. 578, 45 U. S. C., Sec. 153(i)). (Emphasis supplied.)

Thus, in the plainest terms Congress spelled out the mandatory procedure for the handling of disputes of the type which petitioners here contend may be settled by self-help, including a strike, up to the time of referral to the Adjustment Board.

It is argued that the rule of *Chicago River* (*Brotherhood of Railroad Trainmen* v. *Chicago River and Indiana Railroad Company*, 353 U. S. 30) applies only where petitions are already pending before the Adjustment Board. An attempt is thus made to distinguish *Chicago River* from *Manion* (*Manion* v. *Kansas City Terminal Railway Co.*, 353 U. S. 927) by reading into the latter a holding that the *sine qua non* of relief at the hands of the courts was actual pendency of the dispute before the Board. We do not perceive any such holding in *Manion*.

In *Manion* although more than six months had elapsed since the denial of the claims had set the stage for referral to the Adjustment Board, neither the Brotherhood nor the railroad company had taken that step as contemplated by the Act. Thus the statutory grievance procedure was not being followed by the parties in *Manion*. In the instant case, the Railroad and the Union were sedulously following the statutory procedure and the dispute had not reached the stage at which it *could* be referred to the Adjustment Board.

If *Manion* meant that the parties may resort to strike or lockout at will during this preliminary stage, the Act would be self-defeating, because it would leave a hiatus of time during which, despite its stated purpose, either party could legally cripple public trans-

portation and thus frustrate the purpose of the Act. Of course, this is not the law. *Manion* does not so hold or so suggest.

As a matter of fact, it is implicit in *Manion,* in providing for reinstatement of the injunction in the state court once the statutory settlement procedure of the Act is resumed by the parties, that a strike which interferes with that procedure is prohibited. Thus, petitioners' first premise cannot be sustained in view of the legislative purpose of the Act. Cf. *Norfolk & P. B. L. R. Co.* v. *Brotherhood of R. T.,* 248 F. 2d 34 (C. A. 4, 1957), cert. den. U. S. , 78 S. Ct. 343.

In developing their second premise petitioners, conceding that a strike over a minor grievance may be enjoined, deny that damages already sustained from the wrongful economic duress may be recovered. The strike, being in violation of the Railway Labor Act, may be enjoined, they say, accepting *Chicago River,* but whatever injury is done to the Railroad *before* it obtains the restraining order is not compensable—even in a common-law tort action (Petition, pp. 16. 17). No authority is cited for this theory in petitioners' brief, and none has been found by respondent. However, this Court has held in *Steele* v. *Louisville & N. R. Co.,* 323 U. S. 192, that rights under the Railway Labor Act may be enforced by "the usual judicial remedies of injunction and award of damages when appropriate" (323 U. S., at 207). While *Steele* dealt with rights under the Act different from those involved here, we can discern no reason why the broad principle there enunciated should not apply with equal

force in respect of other rights under the Act.[1] There is, after all, no reason why there should be any more conflict with the Board's jurisdiction in a suit for damages than in an injunction suit. In neither would the merits of the primary minor grievance be material. Respondent perceives no basis for any such distinction in *Chicago River* or *Manion.*

The basic fallacy in petitioners' second premise, however, is even more clearly revealed in the statement:

> "The right to strike cannot be said to be 'taken away' by the Railway Labor Act as held by the Court of Appeals in the instant case . . .". (Petition, p. 16).

This statement is, of course, in direct conflict with the basic teaching of *Chicago River* insofar as strikes over minor grievances are concerned. This untenable position which petitioners are forced to assume indicates the difficulty with which they are confronted in attempting to overturn the decision below.

It should be pointed out that the question is not presented on this record of whether an action for damages lies for the breach of a duty imposed under the Railway Labor Act, *i. e.*, as the basis of liability. Count One of the original Complaint, drafted long before *Chicago River* was decided, was cast on such a theory but was dismissed by the District Court. The Court of Appeals upheld the dismissal on the ground that *as drafted* the count did not state a claim upon

[1] In this connection, please see and compare the cases cited in footnote 1 on page 12 hereof concerning the recovery of damages for unlawful strikes and picketing.

which relief could be granted. While respondent submits that an action for damages resulting from a strike in violation of the Railway Labor Act *does* lie if presented on pleadings properly drawn in accordance with the rule of *Chicago River,* this question is not presented on this record. The only ground of liability in this case as the record now stands is that of a wrongful interference with the Railroad's business, *i. e.,* a common-law tort.

The Court of Appeals held on the authority of *Chicago River* that a strike over the hostler-helper grievance would not be a legal strike, not by way of approving a cause of action springing directly from the Act, but in explaining why the District Court had been in error in making certain rulings, including the dismissal of original Count Three, on the apparent assumption that the defendants were free to strike over such a grievance, and to urge other employees to join them, so long as they did not employ violence or other illegal means. When petitioners say that the right to strike over a minor grievance has not been taken away by the Act, they are essentially returning to these rulings of the District Court and defending them against the impact of this Court's decision in *Chicago River.*

It must be remembered that the District Court made these various rulings, including the dismissal of original Count Three, *before Chicago River* was decided. The Court of Appeals merely applied the rule of *Chicago River* and *Manion* and held that the trial court's rulings, based on the assumption that railroad

employees have the right to strike over such a grievance, were laid in error.

In its opinion in *Chicago River* this Court thoroughly reviewed the legislative history leading to the establishment of the National Railroad Adjustment Board. This history and the Court's opinion in that case make it entirely clear that petitioners' assertion that the right to strike over a minor grievance has not been taken away cannot be sustained.

Respondent, therefore, submits that the decision below is in complete accord with the decisions of this Court in the cases mentioned.

Petitioners do not suggest any conflict with decisions from other circuits.

QUESTION 3.

THE DISTRICT COURT HAD JURISDICTION OF COUNTS ONE AND TWO.

Petitioners' question 3 is actually not presented in this Court as the case now stands.

The Court of Appeals did not decide or even suggest that the Firemen's agreement "must be construed in the first instance by the Federal District Court instead of the National Railroad Adjustment Board" (Petition, p. 17). It had no occasion even to reach this point. The Court of Appeals merely held that the District Court was in error in deciding that it did not have jurisdiction to consider the first two counts on their merits (App. A, Petition, p. 32). It is this holding apparently with which the petitioners take issue in their argument under Question 3. No useful purpose

is served by arguing a question not presented. We have, therefore, with due respect for petitioners, rephrased this question to present the point actually dealt with by the court below, *i. e.*, whether a court may entertain jurisdiction of a suit for damages resulting from a strike of railroad employees which is in violation of the Railway Labor Act as well as of a collective bargaining agreement between the railroad and the union representing certain of its employees.

The Court of Appeals answered this question in the affirmative on the obvious authority of *Chicago River* and *Manion,* distinguishing *Slocum* (*Slocum* v. *Delaware, L. & W. R. Co.,* 339 U. S. 239) (App. A, Petition, pp. 31, 32). The question was dealt with, however, purely as one of jurisdiction.

Far from holding that the trial court "must" construe the Firemen's agreement, the Court of Appeals, as previously noted, upheld the District Court's dismissal of Count One on the ground that it did not state a claim upon which relief could be granted and left it for the District Court to pass on the sufficiency of Count Two (App. A, Petition, p. 33).

Thus, at this point there is nothing before the Court to which petitioners can object. Count One is out of the case and Count Two has not yet been held to state a claim upon which relief can be granted under Alabama law. Even though it may ultimately be upheld, there is no way to know on the record before this Court what issues might be presented for trial. This would depend upon the defenses to the court asserted by the defendants. They *might* raise questions requiring

some provision of the contract to be construed. If so, this would not deprive the court of jurisdiction. See *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, 244. On the other hand, they might not. The only defense asserted in the District Court on the former trial was one of a general denial (R. 46).[1] Whether special defenses will be raised on another trial cannot now be known. Certainly it is a distortion of the decision below to state that it held the agreement "must" be construed by the District Court. This point simply is not presented.

Aside from this, however, there is nothing in the *Slocum* case on which petitioners rely that suggests that an otherwise appropriate court does not have jurisdiction of a suit of this kind. In *Slocum* and in the other cases relied upon there was an effort to have a court decide the *primary* dispute rather than submit it to the Adjustment Board. Respondent has at no time sought to have the District Court decide the hostler helper issue. The distinction is too plain to warrant extended argument. This is merely another manifestation of petitioners' persistent confusion of the hostler helper grievance with the wrongful strike. *Chicago River*

[1]Petitioners state that they "have taken the position" and "have maintained" that the Railroad violated the Firemen's agreement, suggesting that this was raised in the District Court. This is apparently assigned as an additional reason for the construction of the Firemen's agreement. There was no such contention in the District Court. It is not mentioned in the pre-trial order (R. 46). This point was raised for the first time in the Court of Appeals. Furthermore, the thirty days' notice referred to in the agreement is that provided under Section 156 of the Railway Labor Act (44 Stat. 582, 45 U. S. C., Sec. 156). This has no application to the abolition of positions. *Beeler* v. *Chicago R. I. & P. Ry. Co.*, 169 F. 2d 557 (cert. den. 335 U. S. 903).

and *Manion* clearly indicate that courts, both state and federal, have jurisdiction over suits relating to judicial relief from a strike in violation of the Act. This in no way impairs the Adjustment Board's jurisdiction over the original grievance. Indeed, these cases stand for the protection of the Board's jurisdiction as does the decision below.

Thus, even though it is not likely that this Court will consider that the point is substantially presented here as the record stands, respondent submits there was no error in the decision below insofar as this ground is concerned.

CONCLUSION.

Certiorari should be denied in this case not only because the decision of the Court of Appeals is correct and not in conflict with other decisions, as we have demonstrated, but for another reason of practical importance. The judgment below is not a final judgment. Thus as the case now stands, if any one of the three grounds relied upon by the Court of Appeals and argued here is valid, reversal of the District Court is required. If the Petition should be granted and the decision below overturned upon one, or even two, of the grounds argued, remand to the District Court upon the remaining ground or grounds would still be necessary. Thus unless this Court should detect the likelihood that upon granting the Petition it would find the Court of Appeals in error on all three of the points argued, issuance of the writ at this time would not dispose of the controversy. A new trial would still be required.

While we recognize that this Court may grant certiorari at an interlocutory stage, we respectfully suggest that to do so in this case would not be economical of the heavily committed time of this Court.

For this and the other foregoing reasons the Petition should be denied.

Respectfully submitted,

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PROOF OF SERVICE.

I, W. L. Grubbs, one of the attorneys for respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st day of April, 1958, I served copies of the foregoing brief on the petitioners, J. M. Brown, Jr., et al., by mailing a copy thereof, with first class postage prepaid, to the attorneys for petitioners as follows:

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